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THE SUPREME COURT AND THE CONFLICT OF LAWS

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The October, 1946 term of the Supreme Court of the United States was noteworthy for several reasons. Not only was the volume of work extremely heavy and the number of vital national issues greater than usual, but disagreement among the justices higher and more startling than was to be expected even from a Court already characterized by surprising if not erratic differences of opinion on matters of law and social policy.[1]

What judgment will be passed on the Court's work of the past eight months in the light of historical perspective is, of course, highly speculative. From the present point of observation, a hasty appraisal suggests that a good many things have been done to such fundamental democratic principles as separation of church and state and religious freedom,[2] freedom of speech,[3] jury trial,[4] the right to counsel,[5] protection against judicial tyranny in labor disputes,[6] unreasonable searches and seizures,[7] and cruel and unusual punishment.[8] A great many people other than the litigants involved are no doubt unhappy with the results of these decisions.

Between occasions when the Court was engaged with the volatile issues of civil liberties and other questions which directly affect our lives, it handed down a number of decisions dealing with lawyers' problems, questions which, although lacking that legal or political sex appeal to put them on page one of the New York Times, nevertheless affect deeply the form of government under which we live and subtly the rights of citizens under that government.

For better or for worse, the conflict of laws came in for considerable

1. The justices registered 240 dissenting votes as against 139 for the preceding term. The percentage of cases which involved dissenting votes increased from 50 to 62. The final tally disclosed 27 five-to-four and four-to-three as compared to 19 such cases the term before. 16 U. S. L. WEEK 3020 (1947).

2. Everson v. Board of Education of Ewing T'p., 67 Sup. Ct. 504 (1947).

3. United Public Workers v. Mitchell, 67 Sup. Ct. 556 (1947); Craig v. Harney, 67 Sup. Ct. 1249 (1947).

4. Fay v. New York, 67 Sup. Ct. 1613 (1947) ("blue ribbon jury"); Ballard v. United States, 67 Sup. Ct. 261 (1946).

5. Gayes v. New York, 67 Sup. Ct. 1711 (1947); Foster v. Illinois, 67 Sup. Ct. 1716 (1947); Carter v. Illinois, 67 Sup. Ct. 216 (1946).

6. United States v. United Mine Workers of America, 67 Sup. Ct. 677 (1947).

7. Harris v. United States, 67 Sup. Ct. 1098 (1947).

8. Louisiana *ex rel.* Francis v. Resweber, 67 Sup. Ct. 374 (1947).

attention during the hectic term. In the words of one of the learned Justices, "Conflict-of-law problems have a beguiling tendency to be made even more complicated than they are."[9] Of this, after contemplating the performance of the 1946 term, it may be remarked that judges sometimes have a beguiling tendency to make them appear simpler than they are. There is, of course, an obvious explanation for this phenomenon. Conflict of laws problems are on a sort of secondary legal level and thus twice removed from the policy problems embraced. This double insulation from the social and governmental issues involved affords a big temptation to deal with a situation on an artificial basis. It is calculated to bring out the lawyer in the judge and thereby expose him to the dangers and pitfalls of the professional craftsman. As likely as not, he will perform a superb operation with consummate skill, not observing that the patient may be dying. It may be distasteful and offensive to his professional instincts to probe through two layers of legal technicalities to examine the sensitive nerve beneath. Too often, it is not until the process is completed that its effects are ascertained.

It is to be observed that the Court had some of the more tangled conflicts problems to grapple with during the term. Full faith and credit, res judicata, the *Erie* doctrine, states' duty to enforce federal law, the right to select a forum, these are not problems of that "beguiling tendency." Certainly those presented at the last term were themselves tough enough to constitute a good sized mouthful for judicial mastication by any tribunal.

Full Faith and Credit out of Hand

Morris v. Jones[10] involved the validity of a ruling by an Illinois court rejecting a claim in liquidation proceedings based upon a Missouri judgment. Chicago Lloyds, an "unincorporated association," had been authorized by the State of Illinois to conduct an insurance business in Illinois and in other states. An action for damages for malicious prosecution and false arrest was initiated against it in Missouri, where the concern was doing business. Before judgment in this action, a liquidator was appointed by an Illinois court under Illinois statutes regulating the insurance business. In appointing the liquidator, the court fixed a time for filing of claims and issued an order staying all suits pending against the firm. Notwithstanding actual notice of this order and the withdrawal of the company's attorney pursuant to the direction of the Illinois court, Morris prosecuted his tort action in Missouri and obtained a default judgment. Upon presentation of this judgment claim, denial by the statutory liquidator in Illinois and affirmance by the Supreme

9. Vanston Bondhôlders Prot. Committee v. Green, 67 Sup. Ct. 237, 243 (1946) (Burton, J.).
10. 67 Sup. Ct. 451 (1947).

Court of Illinois, Morris took his case to the Supreme Court of the United States. In a six to three decision it was held that Illinois had failed to give that faith and credit to the Missouri judgment which is required by Article 4, Section 1 of the Constitution.

"The Full Faith and Credit Clause and the statute which implements it . . . ," said Mr. Justice Douglas, writing for the majority of the Court, "require the judgments of the courts of one State to be given the same faith and credit in another State as they have by law or usage in the courts of the State rendering them. . . . Under Missouri law, petitioner's judgment was a final determination of the nature and amount of his claim."[11]

When the Court tells us that the Missouri judgment must be given the same effect in Illinois as it has "by law and usage" in Missouri, it refers us to the "law or usage" of Missouri to acertain what that effect is. It is at this point that subtle complexities of full faith and credit problems arise. Professor Cheatham has pointed out[12] some of the ambiguities latent in this reference to the "law or usage" of the state where the judgment was rendered. To what Missouri law are we thus referred? Mr. Justice Douglas tells us in this connection to "see Pitts v. Fugate, 41 Mo. 405; Central Trust Co. of Mobile v. D'Arcy, 238 Mo. 676, 142 S.W. 294; State ex rel. Robb v. Shain, 347 Mo. 928, 149 S. W. (2) 812."[13]

Upon looking for light on the question from these cases, we find that one[14] dealt with the effect in Missouri of an Illinois judgment taken pursuant to a *cognovit* clause in a negotiable note. One fails to find any light at all on the question in issue from this case because of its irrelevancy. Another case held that where a surety sues his principal after having satisfied a judgment against both based on a money bond, the original bond obligation was merged in the judgment so that the principal could not plead the illegality thereof as against his surety suing for indemnification.[15] The third case held that a trustee to whom a corporate debtor's property had been conveyed for the payment of its debts was bound by a personal judgment rendered against the corporate debtor.[16] The first judgment was res judicata of all defenses which might have been pleaded therein.

It will be observed that none of this "law" to which we are referred involved a legal problem like the one with which the state court was dealing in *Morris v. Jones.* The problem in the latter case was to ascertain the effect

11. *Id.* at 454, 456.
12. Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt,* 44 COLUMBIA LAW REV. 330, 338 *et seq.* (1944). And see Dutton, *Characterization, Res Judicata and the Lawyers Clause,* 22 IND. L. J. 201 (1947).
13. 67 Sup. Ct. 451, 456 (1947).
14. State *ex rel.* Robb v. Shain, 347 Mo. 928, 149 S.W.2d 812 (1941).
15. Pitts v. Fugate, 41 Mo. 405 (1867).
16. Central Trust Co. of Mobile v. D'Arcy, 238 Mo. 676, 142 S.W. 294 (1911).

of the Missouri judgment by the "law or usage" of that state and then give like effect to the judgment in Illinois. To conclude that, since the Missouri judgment "was a final determination of the nature and amount of the claim" for the purposes of the problem before the court which rendered it, therefore it should be given effect as a final determination for the very different purposes involved in the Illinois liquidation proceedings, would appear, in the absence of further explanation, to be a solution based upon inadequate analysis.

The argument was raised on behalf of the Illinois liquidator that, since the claimant could not, under Missouri law, have obtained his judgment had there been a statutory liquidator appointed in Missouri prior thereto,[17] the judgment need not be given effect in Illinois.[18] To this, Mr. Justice Douglas replies, "The full faith and credit to which a judgment is entitled is the credit which it has in the State from which it is taken, not the credit that under other circumstances and conditions it might have had."[19]

One might suppose that a corollary to this proposition would be that the faith and credit to which a judgment is entitled is the credit which it has in relation to the same or comparable legal problem in the state from which it is taken, not the credit that in a different legal problem it might have. It appears, however, that the legal problem in relation to which the effect of the Missouri judgment is ascertained by the Court is a totally different one from the legal problem raised by its introduction in the Illinois liquidation proceedings.

The legal problem in the Illinois proceedings is to determine the effect of a judgment of State *A* as binding upon the assets of a defunct insurance concern in State *B*. By the very nature of the problem, the court in State *B* cannot decide the case in exactly the same way that a court in State *A* would decide this very case, for the obvious reason that if this very case were before the court in State *A*, the legal problem would be different, since no "foreign" or sister state judgment would be involved at all. Thus, it is clear that when we are referred to the "law or usage" of State *A*, we are not referred to its law applicable to the precise facts of the case before the court in State *B*.

Again, if by the "law or usage" of State *A* we are referred to the law by which a court of State *A* would dispose of a case the exact converse of the one before the court, that is, the effect of a State *B* judgment in a State *A* liquidation proceeding, we would thus refer to the conflict of laws rule of State *A*. If this were the meaning of the reference to State *A*'s law, it is

17. See, *e.g.*, McDonald v. Pacific States Life Ins. Co., 344 Mo. 1, 124 S.W. 2d 1157 (1939).

18. People *ex rel.* Jones v. Chicago Lloyds, 391 Ill. 492, 507, 63 N. E. 2d. 479, 487 (1945).

19. 67 Sup. Ct. 451, 456 (1947).

clear that the effect which the *A* judgment in State *B* would have is what "under other circumstances and conditions it might have had" in State *A*.

Since it actually appears impossible to give a literal meaning to the statutory language requiring that judgments be given in other states "the same faith and credit as they have by law or usage in the courts of the states rendering them," it might be supposed that a sensible solution would be to give the judgment in the second state the same effect that it would have in the first state in a legal controversy as nearly as possible comparable to the one before the court. From this point of view, the Supreme Court of Illinois would appear to have a defensible position when it made reference to the effect of the Missouri judgment in the event it were introducd in liquidation proceedings before a statutory liquidator subsequently appointed in Missouri. Since the judgment would not be accepted by the Missouri liquidator, it need not be accepted by the Illinois liquidator.

The Supreme Court of Illinois could "find no authority for the proposition that the Full Faith and Credit Clause of the Constitution of the United States or the enabling acts thereunder are authority for placing the creditor who has obtained the judgment in a better position in another state than he would be in his own."[20] The dissenting judges in the Supreme Court thought it "a strong thing to say that Illinois could not say that . . . the Missouri claimant must prove his claim the way every claimant in Illinois was bound to prove his"[21] and thus avoid putting a Missouri creditor in a better position in Illinois than Illinois creditors. Nevertheless, according to the majority, both the Supreme Court of Illinois and the dissenting justices are mistaken: the Constitution requires that the Missouri judgment creditor be treated in Illinois in a better way than he would be treated in his own state had a liquidator been appointed there, and in a better way than other Illinois creditors are treated in Illinois. This surely is full faith and credit out of hand.

It is not quite clear from either opinion just what status Chicago Lloyds is supposed to have enjoyed. The majority opinion refers to it as "an unincorporated association authorized by Illinois to transact an insurance business in Illinois and other states." The opinion appears to distinguish the status of "unincorporated association" from incorporation, and thus make inapplicable the rule that the state of incorporation need not recognize a judgment rendered against the corporation in a sister state after dissolution.[22] "No

20. People *ex rel.* Jones v. Chicago Lloyds, 391 Ill. 492, 508-9, 63 N. E. 2d. 479, 487 (1945). The court was bolstered in this view by the fact that the Missouri Supreme Court had taken the same position in McDonald v. Pacific States Life Ins. Co., 344 Mo. 1, 124 S. W. 2d. 1157 (1939).

21. 67 Sup. Ct. 451, 461 (1947).

22. Pendleton v. Russell, 144 U. S. 640 (1891).

such infirmity appears to be present in the Missouri judgment", Mr. Justice Douglas asserts, "and the Illinois Supreme Court did not hold that the appointment of a liquidator for Chicago Lloyds operated as an abatement of the suit."[23] Unless we are to understand that the Supreme Court of Illinois is reversed because, although its decision was correct, the reasons given were erroneous, we must assume that the learned Justice did not regard Chicago Lloyds as having been "dissolved" so that an action against it would abate. On the other hand, Mr. Justice Frankfurter appears to regard Chicago Lloyds as enjoying a status comparable to that of corporate existence. "May Illinois provide that when an insurance concern to which Illinois *has given life*. . . ." "We are concerned here solely with the situation presented by a State's exercise of its power over the liquidation of the assets of an *insurance company of its own creation*." "It seems, therefore, difficult to believe that when the property of a *domestic insurance company*. . . ."[24] It is therefore appropriate to apply the same reasoning to a judgment taken after the "death" of this entity as applies to a judgment against a dissolved corporation.

Again it is not clear from the majority just what it regards as the effect of the decision. The majority asserts,

> "One line of cases holds that where a statutory liquidator or receiver is appointed, the court taking jurisdiction of the property draws unto itself exclusive control over the proof of all claims. But the notion that such control over the proof of claims is necessary for the protection of the exclusive jurisdiction of the court over the property is a mistaken one. As Justice Beach of the Supreme Court of Errors of Connecticut aptly said, 'The question is simply one of the admissibility and effect of evidence; and the obligation to receive a judgment in evidence is no more derogatory to the jurisdiction in rem than the obligation to receive in evidence a promissory note or other admissible evidence of debt.'"[25]

With due respect to Mr. Justice Douglas, it is submitted that the quotation is not "apt," and with corresponding respect to Mr. Justice Beach, the question is not "simply" one of the admissibility and effect of evidence. Mr. Justice Douglas insists that "we do not suggest that petitioner, by proving his claim in judgment form can gain a priority which he would not have had if he had to relitigate his claim in Illinois."[26] The fact remains, however, that petitioner gains a standing in the liquidation proceedings which gives him a tremendous advantage over what he would have had if he had had to relitigate his claim therein, as evidenced by the fact that he carried his case to the Supreme Court in order to secure this advantage.[27] Indeed, if he had

23. 67 Sup. Ct. 451, 455 (1947).
24. 67 Sup. Ct. 451, 458-9 (italics added).
25. 67 Sup. Ct. 451, 455 (1947). The quotation from Justice Beach is from his article, *Judgment Claims in Receivership Proceedings*, 30 YALE L. J. 674, 680 (1921).
26. 67 Sup. Ct. 451, 457 (1947).
27. Mr. Justice Frankfurter meets this point: "But we are not merely passing on the

been forced to relitigate the issue in the liquidation proceedings, it might have turned out that he had no valid claim at all.

Every lawyer knows that there is much significance in the manner in which a problem is put. As remarked elsewhere by Mr. Justice Frankfurter, "Putting the wrong questions is not likely to beget right answers, even in law."[28] To quote Mr. Justice Douglas from the case under discussion, "The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ."[29] It might be thought proper, therefore, to put a full faith and credit problem in a manner which will best expose the conflicting policies of the two states involved. There is much to be said, then, for the proposition as formulated by the minority that

> "[t]he respect to be accorded such a judgment [as the Missouri judgment in this case] must turn on the control which Illinois may constitutionally exercise in the administration of Illinois property."[30]

It would appear that if Chicago Lloyds owned assets in Missouri, a Missouri judgment after the appointment of the Illinois liquidator would constitute a valid judgment claim against such assets,[31] and undoubtedly such judgment would be res judicata to that effect in Missouri and elsewhere. In such a case, the policy of equality of distribution of the defunct company's assets would be defeated, and in Justice Cardozo's words, "the race is to the swift."[32] But this is the result of the power which Missouri may constitutionally exercise over property within its borders. What the majority has decided in *Morris v. Jones* is a very different matter, namely: that the Missouri judgment also constitutes a valid judgment claim against the defunct Company's assets in Illinois, and that the judgment is a "final determination of the nature and amount of the claim" which the Illinois courts are constitutionally obligated to recognize. It seemed to the dissenting minority that the basis which would permit Missouri, as to assets there, to defeat the Illinois policy of ratable distribution by enforcing its own contrary policy, would afford Illinois a comparable power to defeat Missouri's policy by making its own policy applicable to Illinois assets. If, in the one case, the Illinois liqui-

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abstract status of the Missouri judgment. The only issue that has ever been in this case is the right of the Missouri claimant to participate in the Illinois assets on the basis of the face value of his judgment. . . . What was before that court [Illinois] and what is before this Court is whether a Missouri claimant may share in the distribution of a common fund not on the basis of a claim established according to a uniform procedure but on the basis of a judgment secured in Missouri subsequent to the passing of that fund to the Illinois liquidator." 67 Sup. Ct. 451, 462 (1947).

28. Vanston Bondholders Prot. Committee v. Green, 67 Sup. Ct. 237, 243 (1946) (concurring opinion).

29. 67 Sup. Ct. 451, 457 (1947).

30. 67 Sup. Ct. 451, 460 (1947).

31. Clark v. Williard, 294 U. S. 211 (1935).

32. *Id.* at 211, 212.

dator "must submit . . . to the mandate of the sovereignty that has the physical control of what he would reduce to his possession,"[33] why is the Missouri creditor, in the other case, not required to submit to the prior mandate of the sovereignty which has physical control of the assets from which he wishes his claims satisfied?

Res Judicata Running Riot

Ninety years ago, Mr. Justice Campbell, speaking for the Court, declared that "this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."[34] A like proposition had been laid down shortly before when Mr. Justice Wayne had observed that "the law of a State limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other States from suing in the courts of the United States in that State for the recovery of any property or money there, to which they may be legally or equitably entitled."[35] Some fifty-four years later, Mr. Justice Hughes reminded us that a State "could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract."[36]

These propositions, as to diversity cases, had become so commonplace that it comes as something of a shock to learn that they no longer represent the rights of a citizen of one state to sue a citizen of another state in the federal court sitting in the state of the defendant's residence. That right, it now appears, is subject to the willingness of the latter state to permit suits of the character the plaintiff seeks to maintain. To this extent, access to the courts of the United States in diversity cases is controlled by state law.

In *Angel v. Bullington*,[37] the Court makes the most startling of its several novel applications of *Erie R. R. v. Tompkins*.[38] Bullington, a Virginian, sold in Virginia a tract of Virginia land to Angel, a North Carolinian. A deed of trust was executed by Angel to secure purchase price notes. After a default and sale of the land by the trustees in Virginia, Bullington sued Angel in a state court in North Carolina for the deficiency. After a judgment in favor of the plaintiff on demurrer, the case was overruled by the Supreme Court of North Carolina on the grounds that a local statute forbade deficiency judg-

33. *Id.* at 214.
34. Hyde v. Stone, 20 How. 170, 175 (U. S. 1858).
35. Union Bank of Tenn. v. Jolly's Adm'rs, 18 How. 503, 507 (U. S. 1856).
36. David Lupton's Sons v. Automobile Club of America, 225 U. S. 489, 500 (1912).
37. 67 Sup. Ct. 657 (1947).
38. 304 U. S. 64 (1938).

ments in that state.[39] Bullington had urged that the application of the North Carolina statute to deprive him of a deficiency judgment offended the Constitution of the United States. The Supreme Court of North Carolina, however, ruled against him.

> "We cannot hold that this action upon part of the legislative branch of our government impinged the full faith and credit clause of the Constitution of the United States . . . or the general doctrine that the validity of a contract is determined by the law of the place where made, the *lex loci contractus*, as distinguished from the *lex fori*. Both the constitutional provision urged and the general doctrine invoked by the appellee are substantive law and the statute involved, as aforesaid, relates solely to the adjective law. . . . The court, being deprived of its jurisdiction, has no power to render a judgment for the plaintiff in the cause of action alleged."[40]

At a previous point in its opinion, the North Carolina court said,

> "The statute operates upon the adjective law of the State, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this State."[41]

Bullington accepted the decision of the North Carolina Supreme Court and did not seek review in the Supreme Court of the United States. Instead, he brought an action for the deficiency in the Federal District Court for North Carolina, where Angel pleaded his judgment in the state court as a bar. The district court gave judgment for Bullington, which was affirmed by the circuit court of appeals. In a six to three decision, the Supreme Court reversed, holding that the judgment in the state court precluded Bullington's resort thereafter to the federal courts in North Carolina for relief.

Bullington's difficulties brought forth three extensive opinions. The majority, speaking through Mr. Justice Frankfurter, appears to arrive at its conclusion through one or the other of two processes of reasoning. In the first place, the opinion points out that the law of res judicata in North Carolina bars future litigation as to all issues actually raised and decided, and all those which could have been raised in the previous action.[42] It finds that the judgment of the Supreme Court of North Carolina would clearly bar the present suit had it been brought anew in a state court. The opinion subsequently, and not in any particular connection with the res judicata point, develops the thesis of the *Erie* case[43] that "[t]he essence of diversity jurisdiction is that a federal court enforces State law and State policy."[44] The deci-

39. Bullington v. Angel, 220 N. C. 18, 16 S. E. 2d 411 (1941).
40. *Id.* at 20, 16 S. E. 2d at 412.
41. *Ibid.*
42. Citing Southern Distr. Co. v. Carraway, 196 N. C. 58, 144 S. E. 535 (1928); Moore v. Harkins, 179 N. C. 167, 101 S. E. 564 (1919).
43. 304 U. S. 64 (1938).
44. 67 Sup. Ct. 657, 662 (1947).

sion thus may be explained as an application by the Court, under the compelling influence of *Erie,* of the local doctrine of res judicata.

Although it is recognized as an unsafe procedure to accept a dissenting judge's version of a majority opinion, it may be mentioned that Mr. Justice Reed appears to think the majority bases its decision on this rationale.[45] Mr. Justice Rutledge also seems to have some such notion.[46] The majority, however, makes much of the North Carolina statute as reflecting a policy to prevent suits in that state for deficiency judgment. It is in this connection that the opinion makes reference to the *Erie* doctrine. It is therefore a permissible inference that the decision is to be understood as resting on the grounds that *Erie v. Tompkins* requires the federal courts to enforce the state policy of excluding such actions.[47]

It should be noted that on the latter interpretation, we have this phenomenon. The North Carolina Supreme Court, working hard to uphold the constitutionality of the statute against the attack that the Federal Constitution prevents the state from closing the doors of its courts to litigants seeking deficiency judgments, unmistakably characterizes the statute "procedural" as distinguished from "substantive." In order to apply the *Erie* doctrine to the North Carolina policy of exclusion of such suits, the majority must do one of two things—it must either obliterate the distinction between substance and procedure for purposes of *Erie* and thus overrule *David Lupton's Sons v. Automobile Club of America,*[48] or it must characterize the North Carolina statute in a manner directly opposite from the characterization accorded it by the North Carolina Court itself. Mr. Justice Reed appears to think the former is what happened,[49] although the majority opinion itself suggests the latter explanation.[50]

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45. "The Court reaches the conclusion that res judicata should apply by an application of Erie Railroad Co. v. Tompkins." Reed, J., dissenting, 67 Sup. Ct. 657, 665. At an earlier point in his opinion, however, he states that "the doctrine of res judicata, that is a former adjudication, defeats Bullington's claim against Angel. The opinion is limited to that point.", with no mention of *Erie.* 67 Sup. Ct. 657, 662-3 (1947).

46. "On the surface what seems to be decided is simply a question of res judicata. Actually the decision rests on an 'and/or' hodgepodge of res judicata and Erie doctrines." Rutledge, J., dissenting, 67 Sup. Ct. 657, 667 (1947).

47. Mr. Justice Reed appears to think this may be the ground of the decision. He says, "In reaching the conclusion which it does, this Court decides that if a state court does not have power to adjudicate a cause, neither does a federal court in that state." 67 Sup. Ct. 657, 665 (1947).

48. 225 U. S. 489 (1912). This case held that a foreign corporation which was barred from maintaining an action in the state courts of New York because it had failed to comply with certain statutory requirements, could nevertheless maintain an action in the federal court sitting in New York.

49. "In this case, this Court departs from the state court's interpretation of the meaning of a state statute in order to bring about the federal policy of uniformity. By this, the Court departs from the sound rule that a state court's interpretation of state statutes is binding on federal courts." 67 Sup. Ct. 657, 665 (1947).

50. "Cases like David Lupton's Sons v. Automobile Club of America, 225 U. S. 489,

In either event, the effect of the decision is that the power of federal courts to hear diversity cases is now lodged in state legislatures, whereas previously it was thought to have been a prerogative of the Congress. This point is clearly perceived by Mr. Justice Rutledge. "The *Erie* rule," he wrote, "did not purport to change the law of federal jurisdiction in diversity cases, taking it out of the hands of Congress and the federal courts and putting it within the states' power to determine. It purported only to prescribe the rule federal courts should follow in applying the substantive law."[51]

Here is an illustration of the inadequacy of a legal classification which assumes that every rule of law is either "substantive" or "procedural." Such a classification ignores the fact that, in character and function, rules of law which prescribe and limit the power of courts to act are unlike rules of either substantive or procedural law. It might very well be that a sound compromise between horizontal uniformity in all federal courts on the one hand, and local uniformity within the state on the other, would require rules of federal jurisdiction to continue to be governed by federal law. On the other hand, the decision should not be made on the basis of a state court's characterization of its statute in a desperate effort to protect it against constitutional attack.

There is in these opinions much confusion in connection with the principle of res judicata. There is a marked difference of view between the majority and Mr. Justice Reed on what constitutes the "merits" of the controversy. The latter insists that the merits were not considered in the North Carolina decision because the court decided that it had no jurisdiction to give a judgment for the plaintiff.[52] The majority insists that

> "[a]n adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them. . . . The only issue in controversy in the first North Carolina litigation was whether or not all the courts of North Carolina were closed to that litigation. The merits of that issue were adjudicated."[53]

In view of this confusion, it is necessary to examine the question, just what was decided by the Supreme Court of North Carolina. An action is brought by a non-resident to obtain a deficiency judgment against a resident. A local statute provides

> "In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust hereafter executed . . . the mortgagee

. . . are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie Railroad Co. v. Tompkins. . . ." 67 Sup. Ct. 657, 662 (1947).

51. 67 Sup. Ct. 657, 671 (1947).

52. "Where there is no jurisdiction of the subject of the action the judgment is not upon the merits." 67 Sup. Ct. 657, 664 (1947).

53. 67 Sup. Ct. 657, 661 (1947).

or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same."[54]

The non-resident obtains a judgment in the lower state court notwithstanding this statute. Over the appellee's remonstrance that the Federal Constitution guarantees his right to maintain an action for a deficiency judgment, the Supreme Court of the state reverses appellee's judgment on the grounds that the statute "is a limitation of the jurisdiction of the courts of this State."[55]

There are two possible interpretations of the statute in question: one, that it intended to bar deficiency judgments only in the state courts of North Carolina; two, that it intended also to bar such actions in the federal courts. The decision of the North Carolina Supreme Court held that the statute bore the first interpretation. It is unreasonable to suppose that the Supreme Court of North Carolina determined that the statute should have the second interpretation, because the question was not and could not be presented in the case before it. Any attempt so to hold would be mere dicta. Nevertheless, there is the suggestion in the majority opinion that the state court did intend such an interpretation.[56]

If it be conceded, however, that the statute was intended to bar actions for deficiency judgments in federal as well as state courts, the question may then be raised as to its constitutionality as thus interpreted. In other words, there are two possible questions of constitutionality involved. It is quite possible that the statute would be constitutional as prohibiting only action in the state courts although unconstitutional as applied to actions in federal courts. Notwithstanding Mr. Justice Reed's apparent view to the contrary, it seems pretty clear that the North Carolina Supreme Court determined that the statute was constitutional in so far as it forbade actions in state courts. But it almost defies the legal imagination, to interpret the opinion of that court as passing on the constitutionality of the statute in so far as it might bar actions in the federal courts. Nevertheless, if the majority's application of the doctrine of res judicata is sound, the North Carolina Court must have intended such an extraordinary decision. The more reasonable conclusion would appear to be that the North Carolina Supreme Court was passing on the constitutional question as barring an action in the lower state court whose judgment it was reviewing. If this is true, then Bullington was clearly en-

54. Pub. Laws 1933, c. 36; N. C. GEN. STAT. § 2593(f) (Michie, 1943).
55. 220 N. C. 18, 20, 16 S. E. 2d 411, 412 (1941).
56. "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. . . . North Carolina would hardly allow defeat of a state-wide policy through occasional suits in a federal court." 67 Sup. Ct. 657, 661-2 (1947).

titled to a consideration "on the merits" of the constitutional issue should the statute be interpreted as barring actions in federal courts. Such a day in court he never got.

FULL FAITH AND CREDIT ON THE BIAS

A fraternal benefit society, incorporated in Ohio, had a constitution embodying the following clause: "No suit or proceeding, either at law or in equity, shall be brought to recover any benefits under this Article after six (6) months from the date the claim for said benefits is disallowed by the Supreme Executive Committee." By a decision of the Supreme Court, this clause is entitled to full faith and credit in sister states under the Constitution of the United States, *i.e.*, it must be accorded the same effect in other states as it has in Ohio. It must come as a pleasant surprise to the Order of United Commercial Travelers of America to learn that the "law" of their society, when enforceable under the "law" of Ohio, is by constitutional mandate, enforceable as "law" in every state in the Union.

This astonishing development is attained in *United Commercial Travelers v. Wolfe*.[57] In the language of Mr. Justice Burton, writing for himself and four[58] other members of the Court,

> "The case presents the question whether the full faith and credit clause of the Constitution of the United States required the court of the forum, South Dakota, to give effect to a provision of the constitution of the society prohibiting the bringing of an action on such a claim more than six months after the disallowance of the claim by the Supreme Executive Committee of the society, when that provision was valid under the law of the state of the society's incorporation, Ohio, but when the time prescribed generally by South Dakota for commencing actions on contracts was six years and when another statute of South Dakota declared that—'Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.' "[59]

To this statement of the question, it should be added that the contract sued on was made and was to be performed in South Dakota where the defendant society was licensed to do business and where it maintained a local office or "subordinate council," and where the insured and his beneficiary were at all times resident.

Again in the words of Mr. Justice Burton,

> "[u]nder such circumstances, South Dakota, as the state of the forum, was required, by the Constitution of the United States, to give full faith and credit to the public

57. 67 Sup. Ct. 1355 (1947).
58. Justices Black, Douglas, Murphy and Rutledge dissented from the decision of the Court.
59. 67 Sup. Ct. 1355, 1356 (1947).

acts of Ohio under which the fraternal benefit society was incorporated, and . . . the claimant was bound by the six-month limitation upon bringing suit to recover death benefits based upon membership rights of a decedent under the constitution of the society."[60]

It is to be noted that no judicial proceeding of Ohio is involved, nor, except obliquely, any public act of that state. Indeed, there is hardly a choice of law problem involved in the usual sense. The question is whether South Dakota may apply its own statute of limitations in an action on a South Dakota transaction brought by a citizen of South Dakota or whether it must, by Federal Constitutional mandate, apply the limitation contained in the constitution of the society. Put in another way, the question may be said to be whether South Dakota is precluded by the Constitution of the United States from applying her own statute of limitations in an action in her own courts on a cause of action arising there because, had the action been brought in Ohio, the incorporating state, the limitation in the society's constitution would have been applied.

On the face of it, this is an odd result. Over a century ago, the Court ruled that even in an action on a judgment of a sister state, the full faith and credit rule did not prevent the forum from applying the local statute of limitations.[61]

"It would be strange, if in the now well-understood rights of nations to organize their judicial tribunals, according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction."[62]

But we are told that this principle is not questioned.

"The decisions [upon which the Court relies in arriving at its conclusion] are to be distinguished from those which deal only with the well-established principle of conflict of laws that 'If action is barred by the statute of limitations of the forum, no action can be maintained though action is not barred in the state where the cause of action arose' [and] the converse general principle that 'if action is not barred by the statute of limitations of the forum, an action can be maintained, though action is barred in the state where the cause of action arose.' "[63]

The basis for the distinction upon which the Court relies, is said to be in the nature of the relationship of the members of a fraternal benefit society and their society. Just what the magic of this relationship is does not clearly

60. *Ibid.*
61. McElmoyle v. Cohen, 13 Pet. 312 (U. S. 1839).
62. *Id.* at 327.
63. 67 Sup. Ct. 1355, 1365 (1947), quoting RESTATEMENT, CONFLICT OF LAWS §§ 603, 604 (1934).

appear nor is it apparent why the full faith and credit rule is peculiarly applicable thereto. It is said, by way of quotation, that "[t]he act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation."[64] We are further told that "the society is a voluntary fraternal association 'organized and carried on solely for the mutual benefit of its members and their beneficiaries, and not for profit, and having a . . . representative form of government and which shall make provision for the payment of benefits' in accordance with certain statutory requirements [citing Ohio Gen. Code, 1931, § 9462]" and that "[h]owever interwoven their financial rights and obligations, they [the members] have other common interests incidental to their memberships, which give them a status toward one another that involves more mutuality of interest and more interdependence than arises from purely business and financial relationships."[65]

However fascinating this analysis of the mysterious "indivisible unity" of the fraternal benefit society, it does not leap to the legal eye just how it attracts the constitutional prohibition which prevents South Dakota from applying its statute of limitations in an action brought against the society on a South Dakota transaction. Let us examine the "unbroken line of decisions" upon which the Court relies for such light as they may shed on the subject.

Supreme Council of the Royal Arcanum v. Green[66] held that assessments made by a fraternal benefit society pursuant to an amendment to its constitution, valid under the law of the incorporating state, must govern the member's liability in another state where the contract of membership was entered into. In so holding, the Court actually followed decisions concerning stock membership corporations which had held that the law of the state of incorporation determined the liability of a stockholder on his stock subscription and that proceedings in the state of incorporation are binding as to the fact of the corporation's insolvency and of the amount due the creditors.[67] "That the doctrines thus established," said the Court, "if applicable here are conclusive is beyond dispute. That they are applicable clearly results from the fact that although the issues here presented as to things which are accidental are different from those which were presented in the cases referred to, as to every consideration involved the cases are the same and the controversy here presented is and has been therefore long since foreclosed."[68] *Royal Arcanum,*

64. *Id.* at 1364, quoting Modern Woodmen v. Mixer, 267 U. S. 544, 551 (1924).
65. 67 Sup. Ct. 1355, 1364 (1947).
66. 237 U. S. 531 (1915).
67. *E.g.*, Selig v. Hamilton, 234 U. S. 652 (1914); Converse v. Hamilton, 224 U. S. 243 (1912); Bernheimer v. Converse, 206 U. S. 516 (1907); Whitman v. National Bank, 176 U. S. 559 (1900); Hawkins v. Glenn, 131 U. S. 319 (1889).
68. Royal Arcanum v. Green, 237 U. S. 531, 544 (1915).

thus, throws no light on the peculiar character of a fraternal benefit society which calls for any unique treatment under the Constitution.

In *Modern Woodmen v. Mixer,*[69] it was held that the full faith and credit rule required the forum to respect a by-law of the society, valid under the law of the state of incorporation, to the effect that continued absence of the insured could not be a basis for a recovery by the beneficiary until the expiration of the insured's expectancy, notwithstanding a different rule at the forum. This case appears to have some relevancy to the problem. There are, however, significant differences. In the first place, the insured did not become a member of the society in Nebraska, the forum. The state was not, therefore, in the position of seeking to control a local transaction. Again, as in *Royal Arcanum,* the rule which the forum sought to apply was not a rule of procedure, "a thing of policy, growing out of the experience of its necessity." On the other hand, as in *Royal Arcanum,* it applied a rule of law which vitally affected the substantive rights and relations of the member with his associates. In *Mixer,* the member had entered into a "complex and abiding relation" which, under the law governing the society, did not insure against long-continued absence and the Court held that the Constitution prevented the forum from changing the character of the insurance. The forum's interest in the situation was not paramount to the interest of the state of incorporation and its policy could not prevail over the policy of equality of substantive rights of all the members as determined by the law of the incorporating state. In *Royal Arcanum,* the law of the incorporating state which was applied went to the very heart of the relations between the member and his society—the price paid for his insurance—and the Court could hardly fail to hold that the policy of equality in assessments prevailed over the forum's policy of protecting its citizens. As the Court pointed out, any other rule than that applied in the *Royal Arçanum* case would constitute a death sentence to fraternal benefit societies. Indeed, it is clear that the problem in *Royal Arcanum* is one so intimately connected with the state of incorporation that it is inconceivable that the law of any other state should control it. As Mr. Justice Brandeis said, in *Broderick v. Rosner,*

> "The assessment is an incident of the incorporation. Thus the subject matter is peculiarly within the regulatory power of New York, as the State of incorporation. 'So much so,' as was said in Converse v. Hamilton . . . 'that no other state properly can be said to have any public policy thereon.' "[70]

Broderick v. Rosner held that the full faith and credit rule required New Jersey to enforce against a New Jersey citizen the law of the incorporating

69. 267 U. S. 544 (1925).
70. 294 U. S. 629, 643 (1935).

state under which assessments were levied on the stockholders of a New York bank. The principle of the *Royal Arcanum* case was applied. The case thus also fails to disclose any peculiarities in the relationship between a member and his fraternal benefit society which distinguishes it from the ordinary contractual relationship between a private stock corporation and its stockholders and which makes the full faith and credit rule particularly applicable to the problem at hand.

After the foregoing cases, the Court referred to *Milwaukee County v. White Co.*[71] which involved the question of recognition in one state of a judgment for taxes rendered by a court in a sister state, a decision irrelevant to the issue before the Court in *United Commercial Travelers.*

Most heavily, perhaps, did the Court rely on *Sovereign Camp v. Bolin*[72] to sustain its decision. In this case, the Court held that Missouri must recognize a Nebraska judgment holding that the provision of a by-law of a Nebraska society authorizing the issuance of 20-year paid up certificates was ultra vires. It is not easy to perceive the relevancy of the principle involved to the relation between a member and his society under a valid membership policy, nor is it apparent that Missouri's interest in seeking, in effect, to amend the charter of a foreign society is the equivalent to that of South Dakota in applying its own statute of limitations in an action, brought in its own courts, on a South Dakota transaction.

But for the mystic character of fraternal benefit societies, there are other cases which appear more closely related to the problem of *United Commercial Travelers* than those relied on by the Court. In *Aetna Life Ins. Co. v. Dunken*[73] and *New York Life Ins. Co. v. Dodge,*[74] great emphasis was placed on the place where the contract of insurance was made. "The contract," said the Court in *Dunken,* "was a Tennessee contract. The law of Tennessee entered into and became a part of it. The Texas statute was incapable of being constitutionally applied to it since the effect of such application would be to regulate business outside the State of Texas and control contracts made by citizens of other states in disregard of their laws. . . ."[75] So, too, in *Hartford A. & Ind. Co. v. Delta and Pine Land Co.,*[76] the place where the contract was made, together with other contacts, was important. Mississippi was not permitted to "extend the effect of its laws beyond its borders so as to destroy or impair the rights of citizens of other states to make a contract not

71. 296 U. S. 268 (1935).
72. 305 U. S. 66 (1938).
73. 266 U. S. 389 (1924).
74. 246 U. S. 357 (1918).
75. 266 U. S. 389, 399 (1924).
76. 292 U. S. 143 (1934), cited and quoted by Justice Black in his dissenting opinion, 67 Sup. Ct. 1355, 1378 (1947).

operative within its jurisdiction, and lawful where made."[77] In *John Hancock Mut. Life Ins. Co. v. Yates*,[78] an insurance contract was made in New York between a resident of that state and a Massachusetts company. In a suit in Georgia on the policy, it was held that full faith and credit must be given to a New York statute making a policy void if a material misstatement is made in the written application even though the applicant orally gives the agent the true answer.

In stressing the peculiar character of the "indivisible unity" of the membership of a fraternal society, the Court seems to overlook the way in which such societies actually conduct the business for which they are primarily organized. As pointed out by Justice Black in his dissent, no effort is made to demonstrate that "the insurance business of a fraternal company is conducted differently in any important way from that of a mutual, reciprocal, or joint stock company."[79] Unless there is some difference in the function and operation of such societies, to justify a difference in their legal treatment, it is not apparent why a state in which they carry on their operations should be deprived of the same powers of regulation as are exercised with respect to other types of insurance enterprises.

Two Inconvenient Forums

"The eleventh section of the act to establish the Judicial Courts of the United States," said Mr. Justice Wayne as early as 1840, "carries out the constitutional right of a citizen of one state to sue a citizen of another state in the Circuit Court of the United States."[80] A few years later, Mr. Justice Campbell declared that, "the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends."[81] This "constitutional right" of the citizen and correlative duty of the courts of the United States now appears to be qualified by the doctrine of *forum non conveniens*. In two cases, the Court applied the doctrine to affirm dismissals of actions in federal district courts against corporations foreign to the state in which the court was sitting. In both cases, four justices dissented.[82]

In *Koster v. Lumbermens Mutual Casualty Co.*,[83] a member and policy holder, resident of New York, brought a derivative action in a New York federal district court against Lumbermens, an Illinois insurance corporation,

77. 292 U. S. 143, 149 (1934).
78. 299 U. S. 178 (1936).
79. 67 Sup. Ct. 1355, 1381 (1947).
80. Suydam v. Broadnax, 14 Pet. 67, 75 (U. S. 1840).
81. Hyde v. Stone, 20 How. 170, 175 (U. S. 1857).
82. Justices Black, Rutledge, Burton and Reed.
83. 67 Sup. Ct. 828 (1947).

its president and manager and another Illinois corporation of which Lumbermen's president was also the head, alleging breaches of trust, diversion of funds of the corporation and other unlawful dissipation of its assets for his personal profit and that of his friends and family.[84] The corporation had its principal place of business in Illinois but did business in every state. The district court dismissed and the circuit court of appeals affirmed. Both courts relied on *Rogers v. Guaranty Trust Co.*,[85] one court of appeals judge dissenting on the ground that *Williams v. Green Bay & Western R.R. Co.*[86] impliedly disapproved of the *Rogers* case. The Supreme Court affirmed.

Unlike the *Rogers* case, where emphasis was put on the applicability of the doctrine of inconvenient forum to cases involving the "internal affairs" of a foreign corporation, the *Koster* case definitely soft-pedals that rule, if such it is. In fact, Justice Jackson is at some pains to point out that "[t]here is no rule of law . . . which requires dismissal of a suitor from the forum on a mere showing that the trial will involve issues which relate to the internal affairs of a foreign corporation."[87] There is, to this extent, approval of the *Williams* case where the doctrine of *forum non conveniens* as applied to the internal affairs of a foreign corporation was put "in proper perspective."[88]

The emphasis in *Koster* was put on the nature and character of a stockholder's derivative suit and the appropriateness of the forum in the light thereof. It was pointed out that the stockholder actually prosecutes the corporation's cause of action, somewhat as its "next friend," the real party in interest being helpless under the control of the wrongdoers. Although nominally a defendant, the corporation is, in point of interest, a plaintiff. The nominal plaintiff's actual financial interest may be, and apparently was in this case, slight—perhaps not enough to meet the jurisdictional requirements. Moreover, in the present case, if the parties were realigned, according to their real interest, diversity jurisdiction would fail because Illinois corporations would thus be on both sides of the case.

As suggested by one of the dissenting justices,[89] it must be admitted that

84. The complaint alleged that defendant Kemper had arranged for an increase in his own salary from $75,000 to $251,000, that although Lumbermen's was staffed to write insurance without the services of agents, Kemper paid "substantial sums" in commissions to his family corporation as an agency and transferred property and assets of the corporation to himself and friends for prices less than its value, to the injury and loss of the corporation and its stockholders.

85. 288 U. S. 123 (1933).

86. 326 U. S. 549 (1946).

87. 67 Sup. Ct. 828, 833 (1947).

88. 326 U. S. 549, 554. One gets the impression from the *Koster* opinion that the present attitude of the Court is to restrict the doctrine of *forum non conveniens* to situations where the questions raised require the exercise of supervisory functions of the court to the extent which virtually amounts to a task of administration. In such a situation it is not so much that the forum is inconvenient for the defendant as that it is inconvenient for the court.

89. 67 Sup. Ct. 828, 836 (1947) (Mr. Justice Reed).

it is not easy to understand the relevancy of all this alone, to the issue of *forum non conveniens,* "however interesting" it may be. It takes on some point, however, in the light of other aspects of a stockholder's derivative action. "Where there are only two parties to a dispute," the majority observes, "there is good reason why it should be tried in the plaintiff's home forum if that has been his choice. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts which either (1) establish such oppressiveness and vexation to a defendant as to be out of all proportion to plaintiff's convenience, which may be slight or nonexistent, or (2) make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative and legal problems. In any balancing of conveniences, a real showing of convenience by a plaintiff will normally outweigh the inconvenience the defendant may have shown. But where there are hundreds of potential plaintiffs, all equally entitled voluntarily to invest themselves with the corporation's cause of action and all of whom could with equal show of right go into their many home courts, the claim of any one plaintiff that a forum is appropriate merely because it is his home forum is considerably weakened."[90]

These remarks may be thought to be particularly pertinent where the stockholder who institutes the action is, as this one appeared to be, a "mere phantom plaintiff with interest enough to enable him to institute the action and little more."[91] Moreover, it did not appear that there was any particular convenience to the plaintiff to counter-balance the rather obvious inconvenience to the defendant.

> "Petitioner shows not a single witness or source of evidence available to him in New York and does not deny that his complaint will require exhaustive examination of the transactions of these Illinois corporations, all of which occurred in Illinois and are to be tested by its law."[92]

The Court, although mentioning the fact that the law of New York, if applied, would endow the trial judge with discretion to dismiss the action, carefully avoided the issue of whether New York law was to be applied. The Court thus side-stepped the interesting problem of whether the doctrine of *Erie R.R. v. Tompkins* required the federal court to apply the New York inconvenient forum rule.[93]

Gulf Oil Corporation v. Gilbert[94] presented the problem of *forum non conveniens* in a somewhat different context. The Supreme Court again ap-

90. 67 Sup. Ct. 828, 831-2 (1947).
91. *Id.* at 832.
92. *Id.* at 835.
93. The trial court so held in Gilbert v. Gulf Oil Corporation, 62 F. Supp. 291 (S. D. N. Y. 1945).
94. 67 Sup. Ct. 839 (1947).

plied the rule of the inconvenient forum. And again Justices Black, Reed, Burton and Rutledge dissented. In *Gilbert,* we have an individual, resident of Virginia, bringing an ordinary tort action to recover the value of property destroyed by a negligently started fire, against a Pennsylvania corporation in a federal district court sitting in New York. No federal question of any kind was involved, jurisdiction depending entirely on diversity of citizenship.

The district court dismissed the case, believing that under the *Erie* doctrine, the New York law of *forum non conveniens* was controlling.[95] By a divided court, the circuit court of appeals reversed, rejecting the contention that *Erie* was applicable.[96] The same circuit had held a few months earlier in *Weiss v. Routh,*[97] that the New York doctrine of *forum non conveniens* must be applied by a federal court in New York in a case involving the internal affairs of a foreign corporation. Presumably, the district court should exercise its "discretion" in a manner as nearly as possible in conformity with the way a New York court would exercise its discretion. "[A]lthough judicial discretion does indeed imply that the limits are not rigidly fixed," explained Judge L. Hand, "it does not mean that there are none; and in dealing with the question at bar, we are to remember the purpose of conformity in 'diversity cases.' It is that the accident of citizenship shall not change the outcome: a purpose which extends as much to determining whether the court shall act at all, as to how it shall decide, if it does. For this reason, it seems to us that we should follow the New York decisions."[98]

In the *Gilbert* case, however, the circuit court of appeals was able to distinguish the problem from the one dealt with in the *Weiss* case. "We are clear," said Judge Clark, "that New York law should not control in this situation. It is true that in *Weiss v. Routh,* . . . the Court looked to New York law for light as to the extent to which courts would interfere with the internal management of a corporation. But that appears to us much nearer substantive law—that of corporate supervision—than is this question of the place of enforcement of a claim for money damages, and hence much closer to that mystic line past which we dare not venture without state tutelage."[99]

In reversing the circuit court of appeals, the Supreme Court again by-

95. 62 F. Supp. 291 (S. D. N. Y. 1945).
96. Gilbert v. Gulf Oil Corp., 153 F.2d 883 (C. C. A. 2d 1946).
97. 149 F.2d 193 (C. C. A. 2d 1945).
98. *Id.* at 195.
99. 153 F.2d 883, 885 (C. C. A. 2d 1946). After holding that the federal courts were not bound to follow New York law on the issue of applying *forum non conveniens,* the circuit court of appeals reasoned that the course of Supreme Court decisions required the exercise of jurisdiction by the district court in an ordinary common law action in tort. It also based its decision on the grounds that the facts of the case did not disclose "vexation or oppression to the defendant sufficient to justify closing the doors of the courts here," a conclusion with which the majority of the Supreme Court, in its solicitude for the defendant, was unable to agree.

passed the *Erie* problem. "The law of New York," said Mr. Justice Jackson,[100] "as to the discretion of a court to apply the doctrine of *forum non conveniens,* and as to the standards that guide discretion is, so far as here involved, the same as the federal rule [citing New York cases]. It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow."

In applying the "standards that guide discretion," the Court found no controlling convenience to the plaintiff in the New York forum and considerable inconvenience, to the point of vexation, to the defendant. Accordingly, the case was "one of those rather rare cases where the doctrine should be applied." In so holding, the Court considered not only the interests of the litigants but the convenience of the trial court as well, concluding, among other things, that "the course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose."[101]

The implications of the *Koster* and *Gilbert* cases are far-reaching. It should not be supposed that motions to dismiss on the grounds of inconvenience will not become epidemic in diversity cases away from the defendant's home, especially in the case of corporate defendants. For, as Mr. Justice Black pointed out, "[i]t will be a poorly represented multistate defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of action against him is most inconvenient."[102] Indeed, there is doubt whether he will be required to "produce substantial evidence." It is a fair inference from these cases that about all a defendant in such a case need do is to declare his inconvenience in order to place the burden on the plaintiff to show some special offsetting convenience to himself.

The two cases on *forum non conveniens* should be considered in connection with the Court's decision in *Angel v. Bullington.*[103] The latter case apparently holding that, under *Erie,* a federal district court must dismiss an action in which the state courts have been deprived of jurisdiction by a local statute, constitutes a logical basis for the application in federal courts of the state rules of *forum non conveniens.* It is true that the Court did not so hold in *Koster* or *Gilbert* because it was unnecessary to do so. Nevertheless, as a result of the three cases, plaintiff's choice of a forum in diversity cases may be substantially affected. The accessibility of the federal courts will undoubtedly be sharply reduced in actions between citizens of different states.[104]

100. 67 Sup. Ct. 839, 843 (1947).
101. *Id.* at 843, 844.
102. 67 Sup. Ct. 839, 846 (1947).
103. 67 Sup. Ct. 657 (1947). See pp. 890-95, *supra.*
104. It might be noted that some of the justices were not altogether consistent in their

SHADES OF *MAGNOLIA*

In *Industrial Commission of Wisconsin v. McCartin*,[105] the Court appears to mark out the limits of the rule applied in *Magnolia Petroleum Co. v. Hunt*.[106] A workman, employed in Illinois where both he and his employer lived, was injured in Wisconsin. He applied for compensation in both states. An award under the Illinois act was agreed upon and approved by the Illinois Commission after which a formal order was entered directing the payment of the agreed sum. The agreement thus approved also contained the following provision: "This settlement does not affect any rights that applicant may have under the Workmen's Compensation Act of the State of Wisconsin." Thereafter the Wisconsin Commission ordered the payment of certain benefits after crediting the employer with the sum paid under the Illinois Act. The Court held that Wisconsin had not failed to give the credit required by the Constitution to the Illinois proceedings.

It is clear that Illinois, as the state of employment and the residence of both employer and employee might initially apply its Compensation Act notwithstanding that the injury occurred in Wisconsin. Its legitimate interest in the situation is sufficient to permit application of its policy even though the entire work was to be done in another state and the parties had agreed to be bound by the law of that state.[107] It is equally clear that Wisconsin was free in the first place to apply its Compensation Act since the work was done and the injury received there.[108] But *Magnolia* decided that an award in one state was res judicata of the workman's right to compensation and precluded a further award in another state even when credit was allowed for the amount received under the first award.

The Court distinguished *McCartin* from *Magnolia* on the grounds (1) that in the *McCartin* case the agreement reserving the employee's rights under the Wisconsin Act, when approved, became, "in legal effect an award" which, by its very terms, left Wisconsin free to make an additional award, and (2) that the Illinois statute intended awards thereunder to be exclusive only of

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attitude toward the process of limiting the availability of the federal courts in diversity cases. Justice Jackson dissented from the denial of a federal forum in North Carolina to a Virginia plaintiff in Bullington's case although he writes the Court's justification for the abdication of jurisdiction by the federal court in *Koster* and *Gilbert*. On the other hand, Justice Black thinks "the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends." [Hyde v. Stone, 20 How. 170, 175 (U. S. 1857), quoted in his dissenting opinion in *Gulf Oil Corp. v. Gilbert*]. But he saw nothing to which to object in *Bullington* which decided that the jurisdiction of the federal courts was at the mercy of the legislatures of the forty-eight states.

105. 67 Sup. Ct. 886 (1947).

106. 320 U. S. 430 (1942).

107. Alaska Packers Ass'n v. Industrial Accident Comm'n of California, 294 U. S. 532 (1935).

108. Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U. S. 493 (1939).

any further remedy under Illinois law.[109] "If it were apparent," said the Court, "that the Illinois award was intended to be final and conclusive of all the employee's rights against the employer and the insurer growing out of the injury, the decision in the *Magnolia Petroleum Co.* case would be controlling here."[110] This is precisely the approach of Justice Black dissenting in *Magnolia.* "Did Texas intend," he asked, "the award of its Industrial Accident Board against the insurer to bar the right granted the employee by the Louisiana Workmen's Compensation Law to collect from his employer for the same injury the difference between the compensation allowed by Texas and the more generous compensation allowed by Louisiana?"[111]

One looks in vain to find differences in the statutes of Illinois and Texas to justify the differences in interpretation. No attempt was made by the majority in *Magnolia* to defend the interpretation that the Texas act was intended to preclude an award in another state under a compensation act of that state. The normal presumption would be that a statute was not intended to have extraterritorial effect. Moreover, if it were so intended, serious questions of constitutionality would be presented which should not lightly be put aside.[112]

The full faith and credit rule reflects nationally unifying policy. That policy should be carried out, when applicable, unless the relative interests of the states involved call for a different rule. The real problem both in *Magnolia* and in *McCartin* was the appraisal of the interests of the states whose local policies were involved in the light of the national policy of uniformity. The cases won't solve themselves. *McCartin,* on its facts, appears to constitute a retreat from *Magnolia.* At least, it is an indication that the rule of the earlier case is not likely to be extended. It may not be a bad guess that it has been overruled, in effect, if not in words.

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109. "Section 6 states that 'No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act. . . .' This Section has been interpreted to mean that, in situations to which the Act applies, the right of action against the employer under the Illinois common law or under the Illinois Personal Injuries Act . . . has been abolished [citing cases]. To that extent, the Act provides an exclusive remedy.

"But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment [citing cases]. And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted [citing cases], we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction." Murphy, J., for the Court, 67 Sup. Ct. 886, 889 (1947).

110. 67 Sup. Ct. 886, 889 (1947).

111. 320 U. S. 430, 450, 451 (1943).

112. "It is extremely doubtful whether Texas has the power, by any legal device, to preclude a sister state from granting to its own residents employed within its own borders that measure of compensation for occupational injuries which it deems advisable." Black, J., dissenting in Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 450, 455 (1943).

SHADES OF *WILLIAMS*

The Court is again having family troubles. Mr. and Mrs. Halvey were married and lived together in New York. They had one child, a boy of nine. They quarrelled. Mrs. Halvey took the boy to Florida where, after the required statutory period, she sued for divorce. The Florida court granted the divorce and awarded the mother the custody of the child. The day before the decree was granted, the father in some way or other got the boy and took him back to New York. Mrs. Halvey sued out a writ of habeas corpus in New York and was again awarded custody of her child but on condition that the father be permitted to visit him and take him to New York during certain vacation periods. She was also required to file with the court a surety bond, in the sum of $5,000, to insure surrender of the child in Florida when the father should go to get him for his vacations. The Supreme Court granted certiorari on the allegation that the New York court, in modifying the Florida decree, failed to give the faith and credit thereto required by the Constitution.

The Supreme Court affirmed on the ground that there was a "failure of proof that the Florida decree received less credit in New York than it had in Florida."[113] The problem was almost over-simplified. The Florida decree was, as most custody decrees, subject to modification. Under the Florida decisions, such modification could be made on the basis of changed conditions or facts which were not presented to the court at the time of the original decree.[114] "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do."[115] The father had not appeared in the Florida proceedings and the court therefore did not hear his side of the story. He did appear in the New York proceedings. Indeed, both parents as well as the child were before the New York court whereas only the mother was before the Florida court. The New York judge thus clearly had a more complete understanding of the situation than did the Florida judge in the *ex parte* proceedings there.

The case leaves more questions unanswered than are decided. Mr. Justice Jackson concurred on the ground that the record did not show that the Florida court had jurisdiction. Mr. Justice Frankfurter concurred on the ground that the jurisdiction of the Florida court was doubtful. Mr. Justice Rutledge concurred on the ground that under Florida law res judicata had no application to custodial decrees; the Florida decree therefore was "lacking in any quality of finality which would prevent the court rendering it, or another acquiring jurisdiction of the child's status, from altering it."[116]

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113. People *ex rel.* Halvey v. Halvey, 67 Sup. Ct. 903 (1947).
114. The Court relied on Frazier v. Frazier, 109 Fla. 164, 147 So. 464 (1933) and Meadows v. Meadows, 78 Fla. 576, 83 So. 392 (1919).
115. 67 Sup. Ct. 903, 906 (1947).
116. Justice Rutledge relied on Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933)

We may assume that Florida had jurisdiction to grant the divorce based on the wife's domicile there.[117] The question remains, however, whether there was jurisdiction to make the custody award. It is not clear where the child was domiciled. Ordinarily, its domicile would be the domicile of the father if he had not deserted it.[118] Where statutes provide for equal rights of custody by the parents, it seems that the child is domiciled with the parent with whom it actually lives.[119] In the *Halvey* case, therefore, presumably the domestic relations law of New York would control the power of the mother to change the child's domicile from New York to Florida.

In the absence of both domicile and the physical presence of the child in Florida, it is difficult to find a jurisdictional basis for the custody decree of that state,[120] although the child's temporary absence would not defeat jurisdiction if the child were actually domiciled there.[121]

In addition to the question of Florida's jurisdiction over the child, the problems left unanswered by this case include the binding effect of the decree on the husband, he not having been before the court, the power of New York to modify the custody decree to an extent greater than Florida might do, and whether a state in which the child is physically present, regardless of a previous custody decree in another state, may make such orders as it deems in the child's best interest. On all these questions, the Court expressly reserved decision.[122]

This leaves the situation very much where it was before *Halvey*. There are still all sorts of unpleasant possibilities, some of which were pointed out in Justice Rutledge's concurring opinion. If New York can do what Florida could do, then Florida, in turn, can do what New York did. It can modify the provisions of the New York decree.[123] What kind of a situation would

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which quoted with approval a passage from SCHOULER, MARRIAGE AND DIVORCE (6th ed. 1896): "These judgments [of custody] are necessarily provisional and temporary in character, and are ordinarily not res judicata, either in the same court or that of a foreign jurisdiction, except as to facts before the court at the time of the judgment."

117. The Supreme Court apparently assumed the divorce to be valid. The circumstances under which the wife left the husband are not clear. If she left him without thereby being guilty of marital fault under the law of New York, she could acquire a separate domicile of her own. Licht v. Licht, 88 Misc. 107, 150 N. Y. Supp. 643 (1914); *In re* Crosby's Estate, 85 Misc. 679, 148 N. Y. Supp. 1045 (1914). If she was at fault in leaving him, it is questionable whether she could acquire a Florida domicile. See RESTATEMENT, CONFLICT OF LAWS § 28, Caveat (1934).

118. RESTATEMENT, CONFLICT OF LAWS § 30 (1934).

119. White v. White, 77 N. H. 26, 86 Atl. 353 (1913); Bryant v. Dukehart, 106 Ore. 359, 210 Pac. 454 (1922). It is questionable whether, in the absence of such an equal custody provision, the mother could change the child's domicile by taking him with her to her newly acquired domicile.

120. Duryea v. Duryea, 46 Idaho 512, 269 Pac. 987 (1928); People v. Dewey, 23 Misc. 267, 50 N. Y. Supp. 1013 (1898).

121. Wear v. Wear, 130 Kan. 205, 285 Pac. 606 (1930).

122. 67 Sup. Ct. 903, 906-7 (1947).

123. This, of course, is an elliptical way of putting it. Of course, a Florida court cannot modify the decree of a New York court. None but the New York court can do that.

we have if the mother, on returning to Florida, prevailed upon the court there to render a decree which would require, say, that the father return the boy to the mother's custody when the lad's vacation was half over, and fixed a $5,000 surety bond to insure compliance? This sort of thing, conceivably, could go on indefinitely, thus resulting in the "unseemly litigious competition between the states and their respective courts as well as between parents" which Mr. Justice Rutledge feared.

The situation under the Constitution is in pretty much the same mess in regard to custody of children as it is in regard to divorce of their parents. There seems to be no way of reconciling the interests of the states in family quarrels of this character. The full faith and credit rule, as a nationally unifying policy, simply won't work in this field. As Mr. Justice Frankfurter remarked, "conflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise."[124] About all that can be done is to leave such problems to the good sense and judgment of the state courts in the hope that they will reach reasonable results on the facts of each case. The Court has accomplished very little either by the *Williams* cases[125] or by *Halvey*. It may be that it were better if the Court got out of the family law business altogether and let the states stew in each other's juices which, in effect, is about what it is so painfully doing anyway.

Rhode Island and the Third Circuit Get Spanked

Most of the conflicts cases which the Court decided during the term were 5-4 or 6-3 decisions. They involved tough technical questions and profound policy issues. Two cases, however, the Court took in stride—9-0. One involved the duty of the states to enforce, through their courts, a federally created right;[126] the other the application of a state "borrowing" statute of limitations to a federally created liability.[127]

Testa v. Katt was an action against an automobile dealer to recover treble damages for an alleged overcharge under the Emergency Price Control Act of 1942, as amended.[128] The Supreme Court of Rhode Island held that it was contrary to the policy of that state to enforce foreign penal laws, that the provision for recovery of three times the amount of the overcharge was "penal" and that the United States was "foreign" to Rhode Island in the

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The Florida court can, however, render a decree, the provisions of which are different from and inconsistent with the New York decree.

124. 67 Sup. Ct. 903, 907 (1947).
125. 325 U. S. 226 (1945) and 317 U. S. 287 (1942).
126. Testa v. Katt, 67 Sup. Ct. 810 (1947).
127. Cope v. Anderson, Anderson v. Helmers, 67 Sup. Ct. 1340 (1947).
128. 56 Stat. 33 (1942), 58 Stat. 640 (1944), 50 U. S. C. App. 925(e) (Supp. 1946).

"private international" as distinguished from the "public international" sense. Consequently it denied recovery.[129] The Supreme Court reversed.

The Court assumed, for purposes of the case, that the Act of Congress was a penal statute "in the 'public international,' 'private international,' or any other sense." Rhode Island was reminded that "the States of the Union constitute a nation," that the Emergency Price Control Act was the policy of Rhode Island, whether that state liked it or not, and that the supremacy clause of the Constitution required the Rhode Island courts to enforce the penalty provisions thereof.

A similar question, without the penalty issue, was decided in *Mondou v. New York, N.H. & H.R. Co.*[130] when it was held that a state court, otherwise competent, could not decline to exercise its jurisdiction of an action brought under the Federal Employers' Liability Act. In Claflin's case,[131] the Court had declared that "the laws of the United States are laws in the several States and just as much binding on the citizens and courts thereof as the State laws are." Moreover, "the United States is not a foreign sovereignty as regards the several States, but is a concurrent, and within its jurisdiction, paramount sovereignty."[132] And in *McKnett v. St. Louis, etc., R. R.*[133] the Court reminded Alabama that "while Congress has not attempted to compel states to provide courts for the enforcement of the Federal Employers' Liability Act [citing authority], the Federal Constitution prohibits state courts of general jurisdiction from refusing to do so solely because the suit is brought under a federal law." Although the *Testa* case goes somewhat farther than preceding decisions, it is almost, if not quite, required by them. Certainly a different policy would be unthinkable. Rhode Island should have known better.

In the two *Anderson* cases,[134] the Court reviewed decisions of the Third and Sixth Circuits which had reached contrary decisions as to the application of a state "borrowing" statute of limitations. The Court had held in *Anderson v. Abbott,*[135] that shareholders of Banco Kentucky, a bank-stockholding company, incorporated in Delaware, were liable under federal legislation[136] for assessments on shares of an insolvent national bank owned by their holding company. The receiver of an insolvent Louisville national bank instituted proceedings in equity in Pennsylvania and Ohio to enforce assessments against stockholders of Banco living in those states.

129. Testa v. Katt, 71 R. I. 472, 47 A.2d 312 (1946).
130. 223 U. S. 1 (1912).
131. Claflin v. Houseman, 93 U. S. 130 (1876).
132. *Id.* at 136.
133. 292 U. S. 230 (1934).
134. 67 Sup. Ct. 1340 (1947).
135. 321 U. S. 349 (1943).
136. REV. STAT. § 5158 (1875), 38 STAT. 273 (1913), 12 U. S. C. §§ 63, 64 (1940).

The actions were instituted more than five, but less than six years after the Comptroller of the Currency, under federal law, fixed the date for payment of the assessments. The statute of limitations began to run as of that date.[137] There being no federal statute of limitations, the law of Ohio and Pennsylvania was applicable.[138] Both states had six year statutes applicable to the kind of action involved.[139] But both states also had "borrowing" statutes which barred an action if it was barred in the state "where the cause of action arose."[140] Kentucky had a statute of limitations which, if applicable, would bar these actions after five years. The Sixth Circuit Court of Appeals reversed the district court which had held that the action was not barred.[141] The Third Circuit reversed the district court which had held that the action was barred.[142]

The Third Circuit held that "this is not the kind of cause of action which is properly described as arising within the State of Kentucky. It did not arise there any more than it did in any other one of the states of the United States."[143] It is not quite clear what impelled the court to such a decision. The position of the plaintiff was that it arose in the United States but not necessarily in any state of the United States, an argument which the Sixth Circuit rejected as "highly theoretical" and in disregard of the fact that "the United States as a geographical unit comprises the 48 separate states and the District of Columbia."[144]

It is pretty hard to get away from the argument that when a "borrowing" statute refers to the state or country "where the cause of action arose," it is talking about geography. The Supreme Court so held, affirming the Sixth Circuit and reversing the Third. It regarded the cause of action as arising in the state where the combination of facts and circumstances giving rise to the right to sue took place. That appeared to be Kentucky where the bank conducted its operations, where the receiver was conducting its liquidation and where the assessments were payable. Certainly Kentucky was the geographical area most intimately connected with the transactions out of which

137. Rawlings v. Ray, 312 U. S. 96 (1940). The Comptroller set April 1, 1931 as the date for payment of the assessments. The Pennsylvania action was started Feb. 18, 1937, the Ohio suit, Dec. 12, 1936.

138. *E.g.*, McDonald v. Thompson, 184 U. S. 71 (1901).

139. Both the Ohio and the Pennsylvania actions were proceedings in equity, but equity follows the law and "will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." 67 Sup. Ct. 1340, 1341 (1947).

140. OHIO ANN. CODE § 11234 (Throckmorton, 1940); 12 PA. STAT. § 39 (Purdon, 1931).

141. Helmers v. Anderson, 156 F.2d 47 (C. C. A. 6th 1946).

142. Anderson v. Andrews, 156 F.2d 972 (C. C. A. 3d 1946).

143. *Id.* at 975.

144. Helmers v. Anderson, 156 F.2d 47, 52 (C. C. A. 6th 1946).

this cause of action arose, and, in view of the policy of "borrowing" statutes, it seems proper to apply the Kentucky limitation.

CONCLUSION

In several respects, the Court has carried forward in its conflict of laws decisions principles and policies developed over the past dozen years. It pushed hard the policy of terminating litigation under the principle of res judicata, as developed in the two *Baldwin* cases,[145] the *Davis* case,[146] *Chicot County Drainage District*[147] and the *Treinies* case.[148] So, too, it extended the policy of state uniformity as developed in *Erie*,[149] *Klaxon*,[150] *Griffin*,[151] and *Guarantee Trust*.[152] Indeed, it is questionable whether the Court has not developed these policies to the point of diminishing returns.

The *Commercial Travelers* case[153] reflects the cross-currents in the insurance cases. The Court followed the policy reflected in the *Royal Arcanum*[154] and *Mixer* cases[155] while rejecting the policy reflected in *Home Insurance Company*[156] and other cases which stressed the significance of the place where the contract of insurance was made.[157] It may also be observed that the *Commercial Travelers* case contrasts with *Griffin v. McCoach*,[158] decided in 1941. In the latter case the Court stretched the *Erie* doctrine almost to the breaking point in order to allow Texas to apply her own policy to protect the Texas beneficiaries of a Texas insured decedent, whereas in the *Commercial Travelers* case the Court made the full faith and credit rule almost unrecognizable in order to deprive South Dakota of the power to apply her policy to protect a resident, even when the contract of insurance was made in South Dakota.

The policy horse, *forum non conveniens*, also threatens to become unruly. Although stress has been taken away from the "internal affairs" cliche, new and novel applications of the doctrine are almost bound to cause trouble in the future.

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145. Baldwin v. Iowa State Trav. Men's Ass'n, 283 U. S. 522 (1931); American Surety Co. v. Baldwin, 287 U. S. 156 (1932).
146. Davis v. Davis, 305 U. S. 32 (1938).
147. Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940).
148. Treinies v. Sunshine Mining Co., 308 U. S. 66 (1939).
149. Erie R. R. v. Tompkins, 304 U. S. 64 (1938).
150. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U. S. 487 (1941)
151. Griffin v. McCoach, 313 U. S. 498 (1941).
152. Guaranty Trust Co. v. York, 326 U. S. 99 (1945).
153. 67 Sup. Ct. 1355 (1947).
154. Royal Arcanum v. Green, 237 U. S. 531 (1915).
155. Modern Woodmen v. Mixer, 267 U. S. 544 (1925).
156. Home Ins. Co. v. Dick, 281 U. S. 397 (1930).
157. *E.g.*, Aetna Life Ins. Co. v. Dunken, 266 U. S. 389 (1924); New York Life Ins. Co. v. Dodge, 246 U. S. 357 (1918).
158. 313 U. S. 498 (1941).

The division of the Court in the cases under discussion affords grounds for puzzled speculation. The votes of some of the justices are hard to explain on doctrinal grounds. Little light is thrown on the matter by recalling some of the known predilections of the justices. It may be worth mentioning, however, that the successful defendant in *Bullington* represented the debtor class. The successful plaintiff in *Morris v. Jones* was also a little fellow. There were but three dissents in these two cases.[159] In the two *forum non conveniens* cases and in *Commercial Travelers,* the unsuccessful small plaintiffs were able to line up four of the justices on their side.[160] It may also be worth mentioning that in the *McCartin* case,[161] the only conflicts case in which the Court withdrew from a recently established position, the successful party was an injured workman.

It is in connection with the law of judgments that the Court has experienced in recent years its greatest conflict of laws headaches. The highly complex technicalities involved and the clash of conflicting state policies have generated problems that are well-nigh insoluble under our dual form of government. The Court has had a rough ride over this road and there are few prospects that it will get smoother.

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159. In Morris v. Jones, 67 Sup. Ct. 451 (1947), Justices Frankfurter, Black and Rutledge. In Angel v. Bullington, 67 Sup. Ct. 657 (1947), Justices Reed, Jackson and Rutledge.

160. In United Commercial Travelers v. Wolfe, 67 Sup. Ct. 1355 (1947), Justices Black, Douglas, Murphy and Rutledge. In Koster v. Lumbermens Mut. Cas. Co., 67 Sup. Ct. 828 (1947) and Gulf Oil Corp. v. Gilbert, 67 Sup. Ct. 839 (1947), Justices Reed, Burton, Black and Rutledge.

161. Industrial Comm'n v. McCartin, 67 Sup. Ct. 886 (1947).